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## BOOK REVIEWS.

ROBERT W. SKINNER, JR., *Editor-in-Charge*.

LAW: ITS ORIGIN, GROWTH AND FUNCTION, Being a course of lectures prepared for delivery before the Law School of Harvard University. By JAMES COOLIDGE CARTER. New York and London: G. P. Putnam's Sons. 1907. pp. vii, 355.

Although the title of Mr. Carter's book suggests that it is intended as a contribution to historical jurisprudence, and although much of it deals with legal history, it is in reality, as is indicated in the prefatory note, pp. v, vi, and in the opening paragraph of the first lecture, a contribution of legal philosophy. It is an attempt to formulate and to develop a theory regarding the unwritten law. Mr. Carter never made any extensive studies in legal history. Such literature as he commanded is used without discrimination, Montesquieu, Maitland and Guy Carleton Lee (!) being cited as if of equal authority. And he has been led by some of the writers upon whom he relies to make statements which are untrue. His legal philosophy, however, does not rest upon these insecure supports, and his theory of unwritten law is one that contains a large element of truth and deserves respectful consideration.

The Hobbesian theory of law was adopted by Bentham, Mr. Carter points out, because it suited his particular views and purposes, p. 180. This statement may be made of all writers who have propounded philosophic theories of government and of law, including Mr. Carter. In a long and distinguished career at the bar, the public question to which this eminent jurist devoted the most unremitting attention was that of codification. In his consistent opposition to every attempt to codify the common law he was impelled to find a theory which would cause codification to appear not only inexpedient but illegitimate. He might have opposed codification in the United States on political grounds, arguing that in this country national codification is impossible and that state codification would mean the destruction of a body of law which, although nominally state-law, is in reality national. Cf. Monroe Smith, 3 Pol. Sc. Quart. 136 et seq.; W. B. Hornblower, 7 COLUMBIA LAW REVIEW 471 et seq. This line of argument, however, was not only unsatisfactory to Mr. Carter, as based simply on expediency, but also unattractive because he was a state-rights democrat. He found the theory which he needed in the teachings of the historical school, particularly in the emphasis laid by writers of that school upon the derivation of law from custom. To these teachings, however, he was forced, by the exigencies of the codification debate, to give an extension which no other historical jurist has given them. To Mr. Carter, custom is not merely a form of law, coördinate with written law, but in certain broad fields of social relations it is the only real law. In these fields "law \* \* \* is custom, and like custom, self-existing and irrepealable." p. 173. These fields are generally described as those of "private" law, occasionally as the

"domain of liberty." They are coincident with the fields still generally occupied in the United States by case law. When legislation "invades" this domain, "it departs from its just province." p. 135. In describing the unwritten or customary law, Mr. Carter frequently uses phrases which are unfamiliar in historical jurisprudence—phrases which suggest the position assumed by writers of the natural-law school. One passage might be taken for a description of natural law written by a Stoic philosopher or by a medieval churchman: the unwritten law, Mr. Carter says, "is self-existent, eternal, absolutely right and just for the purposes of social government, irrepealable and unchangeable. It may justly be called Divine \* \* \*."

Holding, as he does, that custom is law, Mr. Carter is able to defend the orthodox judicial theory that the law laid down in decided cases is never made by the courts but only found by them. Not only is judge-found law originally drawn from custom, but the entire development of case law is controlled by the development of custom. In admitting, as the author does in many passages, that custom changes, that "in most fully civilized nations \* \* \* customs are subject to incessant change, and that the law resting on custom must change in accordance with it," pp. 257, 258, he apparently contradicts his own assertion that the unwritten or customary law is "irrepealable and unchangeable"; but a careful reading of the entire book makes it clear that he means unchangeable by human volition and therefore irrepealable by legislation. The natural-law phraseology is a survival of older modes of thought. Like most Americans of his generation, the author was brought up on natural-law theories; the theory of legal evolution was a later graft on the natural-law stock of ideas, and the old sap flows freely through the alien branches.

In affirming that all the customs recognized by the courts were law before their recognition, Mr. Carter, of course, has to account for the fact that not all customs are law. He does not evade this difficulty. He admits that morals, as well as manners, are matters of custom, and that neither morals nor manners are law. He meets the difficulty by asserting that there is a line of demarcation which the courts do not create but simply recognize. Those customs, and those customs only, are legal which are necessary for the maintenance of equal liberty in social relations. It cannot be said that this line of demarcation is a very clear one. In applying a principle so general, wide differences of opinion must arise; and power to interpret such a principle would seemingly amount to the power which the positivists assert that the judges possess, viz., the power to make law. Again, in asserting that the judge who recognizes a custom as law adds nothing to it, the author overlooks the positivist contention that something very important is added, viz., the quality of enforceability, and that this is the specific quality of law. Finally, in asserting that all the modifications of judge-found law are merely recognitions of changes in custom, the author admits that "it is the function of the judges to watchfully observe the developing moral thought and (to) catch the indications of improvement in customary conduct"—a function which apparently enables the court to develop rather than to recognize custom. Mr. Carter, however, would say that if they

should mistake the trend of moral thought, the law stated in their decisions would not be law.

Mr. Carter's distinction between public and private law; between the domain of policy and the domain of liberty, is a sound and true one; and if he had confined himself to saying that, in the domain of liberty, the development of law by judicial decisions has marked advantages over the development of law by statutory enactments, his position, in the reviewer's opinion, would have been unassailable. It is to be regretted that in seeking to protect the common law against legislative encroachment he has taken a position which, although it seems stronger, is really far less tenable.

A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA. Adapted for all the States and to the union of Legal and Equitable Remedies under the Reform Procedure. By JOHN NORTON POMEROY. Students' Edition. By JOHN NORTON POMEROY, JR. San Francisco: Bancroft-Whitney Co. 1907. pp. xvi, 1048.

This rather formidable title appears on the back of the cover as "Pomeroy's Equity Jurisprudence: Students' Edition." A work which originally appeared in three volumes and which in its third edition without two supplementary volumes on Equitable Remedies, was in four volumes, now appears for students' use in one volume. It is a novelty in law-book making. Is it worth while? We believe that it is.

But before speaking of the particular volume in question, it will be necessary to say something of the work of which this is an abridgement and this involves a few words as to other treatises on equity. Of the larger works on equity the student who wishes only one will usually be called upon to select from Spence, Story or Pomeroy.

Each of these writers regards his subject from a different point of view. Spence, under the influence of other legal scholars of his day, developed his treatise from an historical standpoint, and confined his discussion to the principles upon which the Court of Chancery exercises its jurisdiction with respect to property. It was published in 1846-1849. Story, in partial discharge of his duties as Dane Professor of Law in Harvard University, published in 1835-36 the first American treatise on equity for a bar which heretofore had depended upon English writings or American editions thereof. Story founded his theory upon the previous English writings and his discussion is enriched by his knowledge of the Civil Law. Pomeroy's first edition appeared 1881-83. It is not without value to note the qualifications of Story and of Pomeroy. The former brought to his task an experience of twenty-five years as a Justice of the United States Supreme Court, and of six years as Dane Professor. During this latter period he had written his *Bailments* and his *Constitutional Law*. Pomeroy had had twenty-five years of practice at the bar and ten years as a teacher, five in the Law School of the University of New York and five at Hastings' College of Law in San Francisco. He had written his *Municipal Law*, *Constitutional Law*, *Code Remedies* and *Specific Performance of Contracts*.

But between the publication by Story and by Pomeroy the American Reformed Procedure, so-called, inaugurated in New York in 1848 had been